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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MATTHEW STEIN, *et al.*,

Plaintiffs,

New York, N.Y.

v.

23 Civ. 2508 (NRB)

SKATTEFORVALTNINGEN,

Defendant.

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Oral Argument

December 21, 2023
2:10 p.m.

Before:

HON. NAOMI REICE BUCHWALD,

District Judge

APPEARANCES

McKOOL SMITH, P.C.

Attorneys for Plaintiffs Stein and Lhote

BY: DANIEL W. LEVY

AKIN GUMP STRAUSS HAUSER & FELD, LLP

Attorneys for Counterclaim Defendant McGee

BY: ROBERT H. PEES

NELSON MULLINS RILEY & SCARBOROUGH

Attorneys for Counterclaim Defendant McGee

BY: DANIEL S. NEWMAN

HUGHES HUBBARD & REED LLP

Attorneys for Defendant

BY: MARC A. WEINSTEIN

WILLIAM R. MAGUIRE

GREGORY FARRELL

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(Case called)

THE DEPUTY CLERK: Are plaintiffs' counsel present and ready to proceed?

MR. LEVY: Good afternoon, your Honor. Daniel Levy, from McKool Smith, for Mr. Stein and Mr. Lhote. Good afternoon.

THE COURT: Good afternoon.

THE DEPUTY CLERK: And is counterclaim defendant Luke McGee's counsel here, as well?

MR. NEWMAN: Yes. Dan Newman, from Nelson Mullins, on behalf of counterclaim defendant Luke McGee.

MR. PEES: And Robert Pees, from Akin Gump, also on behalf of counterclaim defendant Luke McGee.

THE DEPUTY CLERK: Is defendant present and ready to proceed?

MR. WEINSTEIN: Yes. Good afternoon, your Honor. On behalf of SKAT, you have Marc Weinstein, Bill Maguire, and Greg Farrell from Hughes Hubbard & Reed.

THE COURT: Okay. As anybody, I think, who has appeared before me before knows, I generally come with questions. Let me go through those and if, at the end, there is something we haven't covered, you will certainly have a full opportunity to speak.

So for our discussion today, I think it would be useful to proceed on the assumption that SKAT did not breach.

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1 So Mr. Levy, would I be correct if SKAT was found not to
2 breach the settlement agreements, that plaintiffs have
3 breached by failing to pay at least the 600 million krone that
4 was owed?

5 MR. LEVY: They have not paid them the money.

6 THE COURT: Right. So if SKAT has not breached,
7 plaintiff has breached, just intellectually speaking.

8 MR. LEVY: Intellectually speaking, yes.

9 THE COURT: Just intellectually speaking.

10 I want to be absolutely sure that, before we address
11 the specific arguments about validity of the confession of
12 judgment, that I understand the plaintiffs' position. So it
13 is twofold, I think—first, that the 2021 confession of
14 judgment was invalid and unenforceable from the outset; and,
15 second, that SKAT's sole remedy is to file the 2021 confession
16 of judgment. Is that right?

17 MR. LEVY: Not quite, your Honor.

18 THE COURT: Okay.

19 MR. LEVY: So let me just back up.

20 At the outset, when the confession of judgment was
21 originally provided, it was not unenforceable because of the
22 limitations provided by CPLR 3218 that came into force later
23 on. Those came into force a few months after the settlement
24 agreement was executed.

25 Fast-forward about two years, under the contract,

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1 Mr. Stein, Mr. Lhote, and Mr. McGee are required to provide a
2 renewed affidavit of confession of judgment. At that point
3 Mr. Lhote and Mr. McGee both do not reside in New York and, as
4 a result, they cannot have an effective affidavit of
5 confession of judgment. That is as to the 3218 issue. There
6 are some other problems with the affidavit of confession of
7 judgment from the outset, that is starting from 2018, but
8 there are different problems that arise at different times for
9 different reasons. So I just want today clarify that for the
10 Court.

11 THE COURT: Okay. I, in fact, really meant to ask
12 about the 2021 confession of judgment because it's the
13 operative document, and insofar as that confession of judgment
14 goes, it is accurate to say that your position is that it was
15 invalid from the outset because of the residency issue.

16 MR. LEVY: It's invalid at the outset of when it was
17 provided, if that's what you mean by "at the outset."

18 THE COURT: Yes, that's what I mean.

19 MR. LEVY: So if you mean in 2021, it's certainly
20 invalid as to Mr. Lhote and Mr. McGee. And we don't know
21 why—maybe Mr. Weinstein can enlighten us—we don't know why
22 this was not raised at the time, that is, if a mistake of law
23 was made on the part of SKAT and they didn't realize that the
24 affidavit of confession of judgment would not be valid at
25 least as to Mr. Lhote and Mr. McGee, whether they simply

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1 didn't know or they chose not to raise that issue at the time.
2 But there is a mechanism under the contract at section 17 to
3 deal with these kinds of issues as they might come up. That
4 is, the parties allocated the risks that some fundamental part
5 of the contract might be deemed to be unenforceable, and there
6 is a remedy provided under the contract for exactly that
7 circumstance, which is go back and negotiate. We don't know
8 the reason why it was not raised at the time.

9 THE COURT: Okay. So we will talk a little bit more
10 about the validity of the confession of judgment and your
11 arguments about that, but the second argument that you are
12 making is that SKAT's remedy and your emphasis on the word
13 "sole remedy," is essentially to file the 2021 confession of
14 judgment assuming it is valid.

15 MR. LEVY: It's not my emphasis on the word "sole
16 remedy." This is what the parties, represented by rather
17 sophisticated counsel, provided. They said it would be the
18 sole remedy, and there is a whole string of contractual
19 provisions that say exactly that.

20 THE COURT: Okay. We will talk about that, too.

21 So as you just said, insofar as Mr. McGee and
22 Mr. Lhote are concerned, the confession of judgment which they
23 signed, in your view, is ineffective and -- but it says that
24 they each reside someplace else, but they authorize the entry
25 of this confession of judgment in New York County, which to me

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1 could be read as a waiver of the New York CPLR requirement.

2 And I wonder why or would ask why can't a sophisticated party,
3 represented by counsel, waive a right that is for their
4 benefit or statutory provision for their benefit and didn't
5 they do precisely that?

6 MR. LEVY: If it were a knowing and intelligent
7 waiver, maybe. But there is certainly not any information
8 that it was a knowing and intelligent waiver.

9 THE COURT: Excuse me. Weren't the notices to be
10 provided here to the law firm of Kaplan Hecker? Right? So
11 they had counsel. I assume that was the counsel. Is that
12 right?

13 MR. LEVY: In the June 2021 period?

14 THE COURT: In the date -- that's the notice --
15 that's the provision in the updated affidavit of confession of
16 judgment. It says it at paragraph 8 that "we consent to and
17 agree to accept service of process related to this matter"
18 blah, blah "at where we reside, at our respective places of
19 business, including, without limitation, to Marshall L.
20 Miller, Kaplan Hecker & Fink, at 350 Fifth Avenue."

21 MR. LEVY: I think the new language of 3218 does not
22 permit there to be a waiver.

23 THE COURT: Okay. Then let's talk --

24 MR. LEVY: So it may be that that's what the piece of
25 paper says, but --

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1 THE COURT: Well, I don't think a statute has to give
2 explicit permission to people who want to waive a provision
3 that is in there for their benefit. I'm not aware of that as
4 a matter of law.

5 But secondly, and it's also clear if you read the
6 McKinney's commentary, that the concern of the legislature was
7 that all sorts of confessions of judgment were being filed in
8 New York against entities that had no idea that it was
9 happening. Here, these three individuals all were well aware
10 that they were agreeing to the filing of a confession of
11 judgment in New York County.

12 But beyond that, is it not the law that the
13 requirement that you be a New Yorker does not apply when an
14 actual action has been commenced to in effect enforce the
15 confession of judgment. Here we have the counterclaims which
16 are in effect an action. I just cite to you—because I know
17 you know, but for the record—the *Express Trade Capital v.*
18 *Horowitz* case in the First Department, the cite being 152
19 N.Y.S.3d 821, but I will double check. Yes, 821. And beyond
20 the fact that all sorts of different parts of the settlement
21 agreement authorize the filing of an action.

22 MR. LEVY: There is no part of the settlement
23 agreement that provides that there will be an action. There
24 is language in there that says the sole remedy is the filing
25 of an affidavit of confession of judgment. *Express Trade*

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1 concerns the use of a summary judgment in lieu of complaint,
2 which is a procedure that doesn't exist in federal court. So
3 it's really not applicable here, and it doesn't -- it
4 certainly doesn't suggest that there was the equivalent of an
5 action that was filed prior to -- in 2021.

6 THE COURT: Of course not. Because the confession of
7 judgment is never really at the outset of a litigation. It's
8 at the point of a settlement, generally when there are other
9 conditions that need to be fulfilled; and if they are not, then
10 the protection of the prevailing party is the confession of
11 judgment. And beyond that, I still don't know why is it that
12 these two individuals, represented by counsel—they are
13 sophisticated people, involved in a multimillion-dollar fraud
14 scheme—are somehow disabled from waiving, as they said in the
15 document they were, waiving a protection under the law that
16 existed because they were out-of-staters, but they waived it.
17 Why can't they waive it?

18 MR. LEVY: Because under the statute it's not
19 waivable.

20 THE COURT: Where does it say it's not waivable?

21 MR. LEVY: It doesn't say.

22 THE COURT: Okay.

23 MR. LEVY: It just simply says that you cannot file
24 an affidavit of confession of judgment unless the person
25 signing the affidavit of confession --

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1 THE COURT: And so since presumably these two guys --
2 well, we know they are represented by counsel, so they just
3 wanted to trick SKAT; that they knew when they signed it
4 that -- and put the specific language in, which in fact was in
5 the first confession of judgment, as well, that they knew it
6 was no good and this piece of paper was worth nothing?

7 Is that what you are saying that they did?

8 MR. LEVY: Absolutely not.

9 THE COURT: Then what did they do if they didn't
10 waive it and your position is that they can't and the fact is
11 that they said that they did.

12 MR. LEVY: I simply have no information that they
13 knew that this provision, 3218, had changed in between the
14 original signing of the settlement agreement and later on.

15 THE COURT: But they knew enough --

16 MR. LEVY: And so --

17 THE COURT: -- to change the information, right?

18 MR. LEVY: I don't know who drafted the affidavit of
19 confession of judgment.

20 THE COURT: Okay, I'm sorry. I managed -- no, I have
21 it. So the first confession of judgment recites that
22 Mr. Lhote lived in New York. Mr. McGee has apparently always
23 lived in Pennsylvania.

24 MR. PEES: Your Honor, Mr. McGee had moved. I
25 apologize, but he originally was in New York at the time of

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1 the first affidavit of confession of judgment. He relocated
2 to Pennsylvania because of job requirements after --

3 THE COURT: Well, I'm just looking at the first
4 confession of judgment. It says, "Luke McGee resides in
5 Philadelphia County and authorizes initiation of his confession
6 of judgment in New York County."

7 MR. PEES: I believe that's the second --

8 THE COURT: No.

9 MR. LEVY: I will hand to Mr. Pees a copy of the --

10 THE COURT: No, I don't think that's --

11 MR. LEVY: -- confession of judgment.

12 THE COURT: -- correct, unless for some reason the
13 words "updated" don't indicate --

14 MR. PEES: You are correct, your Honor. I apologize.
15 You are correct.

16 THE COURT: We spent a lot of time on this. You are
17 getting an idea.

18 So then the fact is that Mr. Lhote originally in 2019
19 lived in New York, but when it was 2021, the information
20 changed, which indicates a pretty -- some awareness of the
21 significance of where people live in relationship to
22 confession of judgment.

23 MR. LEVY: I submit that that's -- that that would
24 require development of facts about what Mr. Lhote and
25 Mr. McGee knew.

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1 But I just want to make sure it's clear about the
2 sequence of confessions of judgment. There is a signed one
3 that's executed around the time of the settlement agreement,
4 and in the settlement agreement --

5 THE COURT: It provides for the second one, I know.

6 MR. LEVY: Okay. I just wanted -- because they both
7 say "updated affidavit of confession of judgment," and I just
8 wanted to make sure that the Court has the --

9 THE COURT: It actually does say "updated."

10 MR. LEVY: They both do. There is one that's
11 attached to the settlement agreement that's unsigned. That was
12 the form that it would be for later on. Then about two years
13 later, there was a further, for lack of a better term, updated
14 one.

15 THE COURT: Okay. Let's make it simple. The one
16 that says "updated" is signed in 2021. The one that doesn't
17 say "updated" is signed in 2019. I don't think we have to
18 discuss that further.

19 MR. PEES: Correct, your Honor.

20 THE COURT: Okay. But we will have to leave it that.
21 I don't see that there is any law that would prevent either of
22 these gentlemen from waiving any right that only arguably they
23 have under the statute, because I'm not sure I read the
24 statute that way in terms of whether the confession of
25 judgment is being filed or executed upon as part of an action

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1 versus it just being filed with the clerk of the court in
2 state court, because we all, I think, agreed the last time
3 that there is no such procedure in federal court to simply
4 speak to the clerk of the court and give them the confession
5 of judgment.

6 MR. LEVY: If your Honor is interested in this
7 question about waiver and the enforceability of the affidavits
8 of confession of judgment, we are happy to provide some
9 further briefing. It's just not at issue on --

10 THE COURT: Well, it's not going to be --

11 MR. LEVY: -- our motion to dismiss.

12 THE COURT: -- for a number of reasons, so I don't
13 think it's going to be necessary.

14 So, but, in any event, just sort of as a footnote,
15 you really aren't arguing, I think, that the 2021 confession
16 of judgment is totally void, because I think you agreed with
17 me the last time we were together that it is good against
18 Mr. Stein because he is a New Yorker, and I think I noted the
19 last time that it is a joint and several liability. So at a
20 minimum, without further ado, if the SKAT wanted to, it could
21 file the 2021 confession of judgment with the clerk of the
22 court in Supreme Court, New York County, and a judgment could
23 be entered against Mr. Stein, which he could then try to
24 collect against the other two, yes?

25 MR. LEVY: No. We respectfully disagree. It has a

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1 host of other problems as to Mr. Stein.

2 THE COURT: What are those?

3 MR. LEVY: In particular, the lack of a sum certain.

4 THE COURT: Okay. We are going to get to the sum
5 certain.

6 MR. LEVY: Fair enough. Again, it wasn't an issue
7 that was at issue in our motion, but I'm happy to discuss it.

8 THE COURT: Yes, so would I be happy to. I don't
9 think I actually follow that argument, but what is the source
10 of your argument that a confession of judgment must state a
11 sum certain?

12 MR. LEVY: The statute says that it must be for a sum
13 certain --

14 THE COURT: But --

15 MR. LEVY: -- and --

16 THE COURT: But is not this confession of judgment as
17 written contemplating, consistent with the settlement
18 agreement, calculations which would then be embodied in an
19 affidavit that would be submitted in -- with the confession of
20 judgment, and those calculations would then be added up to
21 create a sum certain, correct?

22 MR. LEVY: No, your Honor, respectfully. Because let
23 me give you one example.

24 So paragraph 2 of any version, but I happen to be
25 looking at the latest one --

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1 THE COURT: Yes, me, too.

2 MR. LEVY: -- the one that is Exhibit -- I believe it
3 is Exhibit D to my declaration, right, it says, "The subsequent
4 cash payment," which is the sum of 600 million Danish krone,
5 "and the true-up amount."

6 So the settlement agreement contemplates that there
7 might be disputes about the true-up amount in June of 20 --
8 well, as of today there are disputes about the true-up amount,
9 and as a result there is not a sum certain that --

10 THE COURT: No, not at this moment. No. Look. I
11 said it the last time. If by any chance SKAT wanted to waive
12 everything that they say that the plaintiffs owe them above
13 the 600 million krone, you would object to them seeking less
14 money than they arguably could under this provision? In other
15 words, if they limited their confession, because I don't think
16 that's happening, but just to discuss it, right, but if they
17 limit their request, the 600 million krone, and filed the
18 confession, you would object to that?

19 MR. LEVY: We would for a variety of reasons, but in
20 particular because of the 3218 problem that we have discussed
21 about whether there --

22 THE COURT: But, excuse me, not good against
23 Mr. Stein, a New Yorker.

24 MR. LEVY: No, that argument doesn't apply to
25 Mr. Stein.

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1 THE COURT: So just to be clear, only talking about
2 Mr. Stein, with SKAT waiving any amount above the 600 million
3 krone, SKAT could file a confession of judgment today with the
4 clerk of the Supreme Court, New York County. Yes? Right?

5 MR. LEVY: I'm not going to say whether they could or
6 couldn't. There are significant disputes that are at issue in
7 this case.

8 THE COURT: Leaving aside the merits of who breached,
9 leave that aside.

10 MR. LEVY: They would not be able to, in an
11 affidavit, say that the amount is uncontested because we
12 contest whether the money is owed at all.

13 THE COURT: Play with me for a minute. Assume --

14 MR. LEVY: There was no --

15 THE COURT: -- SKAT has not breached, which we
16 established at the beginning means that the plaintiffs have
17 breached. On that assumption, do you disagree that they could
18 proceed in the limited fashion that I have outlined against
19 Mr. Stein in state court to date?

20 MR. LEVY: I think that's probably right.

21 THE COURT: Yeah, I think so, too.

22 MR. LEVY: Yes.

23 THE COURT: So do you disagree that the confession of
24 judgment, as written, contemplates the application of
25 provisions of the settlement agreement which provides a

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1 procedure to determine the true-up amount and to then
2 calculate interest so that this confession of judgment never
3 was -- at the outset had a full sum certain? It contemplated
4 a procedure to ascertain whatever amount was owed, which would
5 then be in the affidavit that, contemplated by paragraph 3, to
6 be attached to the affidavit of confession of judgment. So,
7 right?

8 MR. LEVY: The settlement agreement provides that if
9 there is a dispute about the true-up amount, which would go
10 into the calculation of the amount under paragraph 2(a), the
11 parties could resolve it either by availing themselves of
12 arbitration or what SKAT could have done here, which is bring
13 a declaratory judgment action instead of a breach of contract
14 action. Right? They have waived the right to have a breach
15 of contract action. They said their sole remedy was the
16 filing of the affidavit of their confession of judgment.

17 THE COURT: First of all, I'm not sure I read the
18 settlement agreement that way --

19 MR. LEVY: I'm happy to address that.

20 THE COURT: -- but the point is that there are
21 multiple provisions in the settlement agreement that give SKAT
22 the right to file a case in this court. This is a proper
23 forum. And that paragraph—I think it's 10(c)—says that if
24 the arbitration/mediation approach had failed, that any party
25 may resort to any other available remedies, including through

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1 other available remedies in a selected court. And we are, I
2 think, a selected court.

3 The same with paragraph 10(a). If you don't reach
4 mutual agreement, any party may pursue the resolution of such
5 matter through other available remedies in a selected court.
6 I don't see where you find in this agreement some limited
7 procedure that only certain procedures SKAT could use. And
8 besides, isn't this all really form over substance?

9 MR. LEVY: It is --

10 THE COURT: Just a second. You filed and sought, you
11 know, relief. If SKAT had filed a separate case in this
12 courthouse under any -- you know, either styling it as a
13 breach of contract, declaratory judgment, what would have
14 happened? It would have been referred to me as a related
15 case. So whether it is two cases with two docket numbers or
16 it's one case with a single docket number, it's going to be
17 before me, as it would regardless.

18 MR. LEVY: Right. But, your Honor, I think where
19 your Honor started is, respectfully, in error --

20 THE COURT: Okay.

21 MR. LEVY: -- because where I start is paragraph 2(c)
22 of the settlement agreement.

23 THE COURT: All right, and --

24 MR. LEVY: But what it --

25 THE COURT: Go ahead. I'm sorry.

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1 MR. LEVY: No. I'm here to answer your questions, and
2 I want to -- I suggested that you were in error, and I wanted
3 to make sure that I could explain why I believed that.

4 THE COURT: Please.

5 MR. LEVY: Okay. So paragraph 2(c), in particular
6 the last sentence, "In the event that the covered parties
7 timely complete the initial cash payment"—that's the first
8 950 million Danish krone—"then SKAT's sole remedy for the
9 covered parties' failure to pay the remainder"—Mr. Stein,
10 Mr. Lhote, and Mr. McGee are among the covered
11 parties—"their sole remedy is" -- "shall be the filing of the
12 affidavit of confession of judgment against the covered
13 parties' designees as set forth in section 5."

14 If it means something, it means that their remedy is
15 limited.

16 Section 5(c), "In the event of a default, on the
17 default date, SKAT shall be authorized to file the confession
18 of judgment and to seek and enforce the judgment that the
19 Court enters."

20 There is nothing else that suggests that SKAT has
21 another remedy. And if we are to read the words with any
22 semblance of common sense, it means that that's it, that's
23 their sole remedy.

24 Section 10 doesn't provide for a breach of contract
25 for the payment of the entire amount that's due and owing.

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1 What it says is that SKAT is permitted to either have an
2 arbitration if the amount is less than 20 million Danish krone
3 or—or—they can seek a remedy for solely these disputes
4 related to the true-up amount. That is all that paragraph
5 10(e) means.

6 Paragraph 10(e) says, among other things, "The
7 parties acknowledge that the means of dispute resolution set
8 forth in this section 10 shall not limit the remedies
9 available to SKAT upon the occurrence of an event of default
10 pursuant to section 5."

11 It doesn't sweep away the sole remedy provision. It
12 underscores the sole remedy provision.

13 And all that language is intended to mean, if there
14 is a dispute relating to the true-up amount, it doesn't mean
15 that SKAT is deprived of the remedies under section 5, which
16 are solely the filing of the affidavit of confession of
17 judgment.

18 So section 10 -- is there something you would like me
19 to walk through? You looked at my quizzically.

20 THE COURT: I'm just not following.

21 MR. LEVY: Let me start again. Section 2(c) says
22 "full remedy."

23 THE COURT: First of all, there is another way to
24 read 2(c), which the defendants have suggested. It is that
25 the sole remedy means that it is against the three

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1 individuals, rather than that there are any remaining remedies
2 against the remainder of the covered parties. That's the
3 first thing. So I don't think --

4 MR. LEVY: Can I respond to that?

5 THE COURT: Sure.

6 MR. LEVY: It's preposterous, because it doesn't say
7 the sole remedy shall be against the covered parties'
8 designees. If it did, full stop, I would agree with your
9 Honor completely. But it doesn't. It said, "The sole remedy
10 shall be the filing of the affidavit of confession of
11 judgment."

12 THE COURT: It says, "The sole remedy for the covered
13 party's failure to pay the remainder of the final settlement
14 amount shall be the filing against" -- "the filing of
15 confessions of judgment against the covered parties'
16 designees."

17 MR. LEVY: Correct. So if it said "the sole remedy
18 shall be as against the covered parties' designees," I would
19 agree with you, but it doesn't say that. It provides a set of
20 people, the covered parties' designees, the three people who
21 are parties to this case, and the mechanism, and it limits the
22 mechanism to the affidavit of confession of judgment. And if
23 your Honor looks at paragraph 5(c), it says exactly that.

24 THE COURT: But --

25 MR. LEVY: Look at the last --

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1 THE COURT: -- confession of judgment in paragraph 2
2 is much broader than some preexisting number. It contemplates
3 a procedure to determine the true-up amount and provides
4 additionally for interest payments for failures to pay.

5 MR. LEVY: But I can't -- the number of times that
6 this settlement agreement points to the sole remedy --

7 THE COURT: No, actually it's only one place. The
8 word "sole" is only in one, right?

9 MR. LEVY: But the concept of affidavit of confession
10 of judgment and that being the limit on what can happen upon
11 an event of default, that's in multiple places. Look at
12 section 5(c).

13 THE COURT: But why, if you are looking at the
14 confession of judgment, would that preclude SKAT availing
15 itself of other remedies to determine the true-up amount? So
16 I don't understand why it is so -- what is it that you think
17 you get by talking about the sole remedy? Does that reduce
18 the amount that SKAT can recover?

19 MR. LEVY: It doesn't reduce the amount, but --

20 THE COURT: It does not reduce the amount.

21 MR. LEVY: It does not reduce the amount.

22 THE COURT: And --

23 MR. LEVY: So what it does is it means that SKAT's
24 rights stand in full on the affidavit of confession of
25 judgment. It also means that SKAT can't decide that it wants

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1 to sue the covered parties, the larger group, as opposed to
2 the covered --

3 THE COURT: They are not trying to, so we don't have
4 to worry about that.

5 MR. LEVY: Fair enough.

6 And it also limits the amount of time that SKAT would
7 have to bring an enforcement action, because CPLR 3218, under
8 all circumstances, limits the filing of an affidavit of
9 confession of judgment --

10 THE COURT: But didn't you just waive that?

11 MR. LEVY: We --

12 THE COURT: Didn't you?

13 MR. LEVY: We certainly didn't waive the three-year
14 time frame. We agreed to push it off for six months, which is
15 a perfectly -- is perfectly valid, we are not going to waive
16 it. SKAT asked us for a new one. We wouldn't give that.

17 THE COURT: Fair enough.

18 MR. LEVY: So, no, it --

19 THE COURT: So they still have -- if I would find
20 that the confession of judgment is not defective, as you
21 suggest, they still would have three years from June, until
22 June of 2024, and they could, in that time period, get a court
23 to resolve the true-up amount if you didn't choose to agree
24 with them as to what it is.

25 MR. LEVY: Correct. And that's what they should have

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1 done in the first place.

2 THE COURT: Why is that different than their
3 counterclaim which seeks essentially that?

4 MR. LEVY: It doesn't seek essentially that. It
5 seeks to enforce the -- to have the covered parties' designees
6 pay the amount under the affidavit of confession of judgment
7 or, in the alternative, breach of contract damages. That --

8 THE COURT: But bottom line, is SKAT seeking any more
9 in their counterclaim than the amount that could be
10 established, because it hasn't been yet, under the confession
11 of judgment to be owed? They didn't add stuff. They didn't,
12 like, throw in an attorney's fee provision or something like
13 that.

14 MR. LEVY: They did not.

15 THE COURT: Or cumulative damages or whatever.

16 MR. LEVY: They did not. And if the Court's ruling
17 is to deny the motion to dismiss as to the amount sought by
18 the affidavit of confession of judgment and simply dismiss the
19 alternative remedy that SKAT seeks, which is breach of
20 contract damages, we would be fine were that.

21 THE COURT: Well, that only works -- that works for
22 you because you challenge the validity of the confession of
23 judgment, and that would be the advantage to you --

24 MR. LEVY: But --

25 THE COURT: -- because the -- but there is law, which

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1 I'm not fully conversant with, that says that when a
2 confession of judgment is found to be defective in some way or
3 unenforceable, that that doesn't eliminate the underlying
4 claim. Then I recognize that you would say, but here you
5 have -- that word "sole" would come into play. But what -- in
6 the end, what difference does it make? In other words, there
7 is one calculation --

8 MR. LEVY: Correct.

9 THE COURT: -- that has to be made. It's the true-up
10 amount. You haven't agreed to go to arbitration on that,
11 despite the fact that your potential arbiter, it is two
12 friends of mine, and I wouldn't have minded if they did well
13 by you, both really good. You didn't choose to do that
14 because you say they breached, okay, but you clearly don't
15 have an agreement between you as to the true-up amount. What
16 prevents SKAT from proceeding in court to ascertain what the
17 true-up amount is?

18 MR. LEVY: There is nothing. Section 10 provides
19 that if the matter is not arbitrated, it contemplates that
20 there is an action.

21 THE COURT: Right.

22 MR. LEVY: So SKAT should have simply brought a
23 declaratory judgment seeking the Court to make a determination
24 as to what the true-up amount is. They didn't.

25 THE COURT: What is the magic of the words

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1 "declaratory judgment" versus trying to enforce a confession
2 of judgment which contemplates additional proceedings? I
3 mean, in other words --

4 MR. LEVY: It may and, again, if the Court denies the
5 motion as to the amount sought by affidavit of confession of
6 judgment and grants it as to the alternative remedies of
7 breach of contract, we would be fine. And it's not because it
8 gives us an advantage but, rather, because it's consistent
9 with the contract.

10 The contract says the sole remedy for the failure to
11 make the final payment is the filing of the affidavit of
12 confession of judgment. That is section 2(c). And then
13 section 5(c) says that the remedy for -- excuse me, on the
14 default date, in the event of a default, SKAT shall be
15 authorized to file it the affidavit of confession of judgment.
16 That's the end.

17 THE COURT: But --

18 MR. LEVY: So their right to a remedy depends on the
19 validity of the affidavit of confession of judgment. And the
20 law that you mentioned about -- sorry.

21 THE COURT: I just need a bottle of water.

22 MR. LEVY: I have one, if you like.

23 THE COURT: No. I couldn't accept it.

24 MR. LEVY: Fair enough. I just happen to have two.

25 THE COURT: That's okay. I try to live on my own

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1 salary.

2 MR. LEVY: Fair enough.

3 THE COURT: But the point is that the confession of
4 judgment contemplates more, it's not just taking the piece of
5 paper and dropping it on the clerk's desk and saying, hi, give
6 me a judgment.

7 MR. LEVY: If the Court denies the motion as to the
8 amount sought by the filing of the affidavit of confession of
9 judgment and grants it such that the alternative remedy for
10 breach of contract, which is not contemplated by the contract,
11 and it's inconsistent with the contract, not just the sole
12 remedy provision, but everything else in the contract, then we
13 would be fine.

14 But that's not what SKAT decided to do. They should
15 have filed a declaratory judgment seeking to have the Court
16 make a determination of the amount of true-up amount because
17 that's what's contemplated by section 10, and section 10 does
18 not contemplate bringing an action for breach of the
19 obligation to pay the true-up amount. They chose to bring a
20 breach of contract claim that they have walked away from.
21 They bargained away the right to bring a breach of contract
22 action and they opted for the simplicity of an affidavit of
23 confession of judgment.

24 THE COURT: I'm not sure that's true.

25 MR. LEVY: It's, it's --

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1 THE COURT: No, if you go to section 10 or you go to
2 section 12, it seems to me that SKAT can exercise other
3 remedies or it can be in pieces. In other words --

4 MR. LEVY: I submit, your Honor, that the notion that
5 section 10 contemplates a breach of contract action for the
6 failure -- for any failure relating to the true-up amount, I
7 submit is in error. Look at paragraph 10(a), right at the
8 very beginning. This is what sets out what disputes could be
9 referred to the arbitrator. "Arising out of or relating to the
10 true-up process," not determination of what the true-up amount
11 is, but the true-up process, and that includes the
12 determination of the amount, except that it just says "arising
13 out of or relating to," but it is simply a determination of an
14 amount. And you couldn't even have a failure to pay it until
15 the amount has been determined.

16 THE COURT: Okay --

17 MR. LEVY: So section 10 --

18 THE COURT: -- but --

19 MR. LEVY: -- doesn't --

20 THE COURT: But it's clear under the confession of
21 judgment that there has to be a determination of the true-up
22 amount somehow which then gets reflected in the supporting
23 affidavit that would have to be filed along with the
24 confession. And the interest rates, I assume, are
25 mathematical and not -- don't need a full proceeding to

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1 resolve. So that's the bottom line.

2 MR. LEVY: I --

3 THE COURT: And I don't -- and your clients don't
4 want to, I assume, waive any right they think they have and
5 participate in some arbitration or mediation about this, but it
6 just seems that you are standing on form over substance.

7 MR. LEVY: We are not.

8 THE COURT: It very much seems that way.

9 MR. LEVY: I understand, and I am happy to continue
10 to try to explain.

11 The contract provides that SKAT's sole remedy for a
12 failure to pay is the filing of the affidavit of confession of
13 judgment. Its enforcement rights stand and fall with the
14 affidavit of confession of judgment. They thought it was for
15 their benefit. I accept that they may have thought that that
16 was the case. So be it. They simply just can't say, no, well
17 we also want as an alternative breach of contract claims in
18 case the affidavit of confession of judgment, for example, has
19 failed. That they don't get.

20 THE COURT: But --

21 MR. LEVY: And so --

22 THE COURT: -- you may not get to give them a
23 confession of judgment, which you now argue was void from the
24 beginning, so you want to have your cake and eat it, too.
25 Right?

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1 MR. LEVY: No. We want to enforce this contract and
2 all the parts that benefit us. We accept there are some that
3 don't. But the fact of the matter is SKAT walked away from
4 enforcing the -- its rights under any mechanism other than the
5 affidavit of confession of judgment. That's what -- if it's
6 to mean anything, the sole remedy provision means that, and
7 there is no other part of this contract that gives SKAT rights
8 to do -- to bring a contract action for the failure to pay
9 anything under this contract. It simply doesn't. 2(c) is --
10 that sentence of 2(c) is as clear as it can be. It must mean
11 something. And if it's to promote --

12 THE COURT: I offered an alternative reading to you.

13 MR. LEVY: And I submit that that is not consistent
14 with other parts of the contract that point to the affidavit
15 of confession of judgment, in particular, the subsection of
16 section 5(c) which says, when there is a default -- it doesn't
17 say "and SKAT may avail itself of all remedies." This is
18 section C and the sentence beginning "in the case of an event
19 of default," and then in the next sentence "on the default
20 date, SKAT shall be authorized to file the confession of
21 judgment and to seek to enforce the judgment that the Court
22 enters." It does not say SKAT may avail itself of any
23 available remedies. That concept is not present in this
24 contract.

25 THE COURT: Except that the confession of judgment

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1 itself contemplates additional proceedings to determine the
2 true-up amount and that this is not the type of confession of
3 judgment which is a party agrees to make 60 payments in
4 support of the settlement amount and they stop at 40 and you
5 can just kind of do the math on its face.

6 MR. LEVY: I accept that this is more complicated.
7 What it doesn't contemplate is bringing a breach of contract
8 action and getting contractual remedies. What it contemplates
9 is the filing of the affidavit of confession of judgment. That
10 was supposed to benefit SKAT because it puts them on the one
11 yard line. Why would they bring a breach of contract action
12 and start back in their own end zone?

13 THE COURT: Your position is they are not even on the
14 one yard line, they are at the zero line because this
15 confession of judgment was void from the outset.

16 MR. LEVY: If it's void and there's been a failure of
17 consideration for the second part of the contract and needs to
18 be rescinded, so be it. I accept that that may be the result
19 of what we have sought by Count One of the complaint. Right?
20 That's what we have sought, which is, they have breached and
21 we are entitled to a rescission of the unperformed obligations
22 of the contract.

23 THE COURT: But assume they haven't breached. You
24 want them to have not much of a confession of judgment, right,
25 because that's separate. It doesn't turn on who breached.

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1 The validity of the confession of judgment doesn't turn on who
2 breached.

3 MR. LEVY: We want to hold them to this contract, and
4 the contract doesn't provide as a remedy the bringing of a
5 breach of contract action. What it provides is --

6 THE COURT: Why does that really matter if the SKAT
7 is not seeking any amount of money greater than provided for
8 in the confession of judgment? So if we assume that you would
9 lose on the argument that the confession of judgment is
10 defective in some way, if they -- if it's good, it's operative,
11 and they do not seek a penny more than is provided for in the
12 confession of judgment, why should we even be spending time
13 on --

14 MR. LEVY: Because --

15 THE COURT: -- the format of the claim, just like if
16 they filed a declaratory judgment action separate from your
17 case and they filed it in this court, which is a selected
18 court under this, both claims come here to be decided.

19 MR. LEVY: They could have done that and they chose
20 not to do that and here's why it matters, because the
21 assumption is not one that we are willing to make. You have
22 asked us to assume that the affidavit of confession of
23 judgment is not void, and I'm not going to concede that.

24 THE COURT: No, I'm not asking you to. You know
25 that.

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1 MR. LEVY: So it may be void and if it is void and
2 nonetheless SKAT is allowed to bring a breach of contract
3 action, then they are getting something that they bargained
4 away. They bargained away the right to bring a breach of
5 contract action. They confined themselves to solely the
6 filing of an affidavit of confession of judgment, and we are
7 not going -- we are going to hold them to that bargain. And
8 the notion that they could have this last for -- they could
9 bring that declaratory judgment in four years, right, because
10 a breach of contract action under New York law would typically
11 be allowed in six years, right, so they have years more to
12 bring it, they could theoretically sue the covered parties,
13 they can say they don't want to do it. But I'm not going to
14 sit here today and I don't think the Court should sit here and
15 give them something that they bargained away. It may be that
16 they cited some cases that talk about if there is a remedy
17 that fails they should be given a different remedy, but we
18 explain in our papers why that state law doesn't apply. We
19 explain --

20 THE COURT: But if you trick them, in a sense, by
21 putting this -- these provisions in the confession of judgment
22 in which it would have amounted to all three of the people who
23 were confessing judgment agreed to filing the confession of
24 judgment in New York but in fact you didn't really believe
25 that and counsel was well aware of the change in the law, and

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1 so you gave them a confession of judgment that was really not,
2 in a sense, worth the paper it was written on, that would
3 somehow mean that they couldn't sue you for breach of contract
4 or had no remedy whatsoever?

5 MR. LEVY: Apart --

6 THE COURT: Assume your clients really did bad, you
7 know.

8 MR. LEVY: I'm not going to assume that for a single
9 solitary second.

10 THE COURT: It was a conscious decision to sign to
11 provide what at least two of the three of them believed was a
12 totally ineffective confession of judgment. I don't think I
13 agree with that proposition, but let's say that was the fact.

14 MR. LEVY: Right.

15 THE COURT: And they gave them a piece of paper that
16 was worth nothing. You are saying at that point that SKAT
17 would not have a remedy?

18 MR. LEVY: If it was the result of SKAT's own mistake
19 of law, if SKAT didn't know, then --

20 THE COURT: SKAT's supposed to know when you say on
21 the face of the document we consent to filing in New York?

22 MR. LEVY: If SKAT knew that the law had changed,
23 there is zero chance that they would have provided for that
24 affidavit of confession of judgment. There is piles of
25 lawyers representing SKAT, piles of them. If they knew that

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1 the law had changed, there is zero chance that that affidavit
2 of confession of judgment would have been signed.

3 THE COURT: What should they have put in other than
4 "you may file this New York County"?

5 MR. LEVY: They would have -- they would have -- at
6 the time they had a tremendous amount of leverage and they
7 would have done exactly what section 12 says to do, which
8 is -- excuse me, section 17 says to do, which is renegotiate.
9 There is zero chance, knowing that. But --

10 THE COURT: Well --

11 MR. LEVY: And if they did know, then they bore the
12 risks. And a court sitting in equity is not going to give
13 them a remedy that they effectively gambled away. And if they
14 didn't know, they made a mistake of law and, as a result,
15 courts sitting in equity don't give parties that make mistakes
16 of law equitable remedies. We cite --

17 THE COURT: What is the equitable remedy --

18 MR. LEVY: The equitable remedy would be a remedy
19 that they have --

20 THE COURT: Breach of contract is not an equitable
21 remedy.

22 MR. LEVY: Correct. Exactly. And that's the other
23 part of the reason why this law -- this doctrine where a
24 remedy fails, a court sitting in equity can give an equitable
25 remedy. The Court would have to fashion something that has

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1 never been done before. We explained in our brief that --

2 THE COURT: Okay.

3 MR. LEVY: -- this little fail safe does not apply.

4 THE COURT: Okay. Well, I don't think we will have
5 to get there.

6 One second.

7 (Pause)

8 THE COURT: Just one thing. I thought we maybe
9 clarified it the last time, but we have a court reporter, so
10 it's probably better to do it now.

11 There is no longer, if I'm correct, any argument --
12 let me state that another way.

13 Plaintiff is not pursuing, if I understand correctly,
14 an argument that SKAT cannot proceed in federal court and that
15 if they filed the confession of judgment in federal court,
16 federal procedural rules would apply.

17 MR. LEVY: Yes, and there are some cases—we cite
18 some of them—about when a party wants to file an affidavit of
19 confession of judgment in federal court, what are they to do.
20 They are not to file a breach of contract action, they are to
21 do what we attached. I think it is Exhibit E of my
22 declaration. You initiate an action and you -- to invoke the
23 Court's jurisdiction and to have the Court enter the affidavit
24 of confession of judgment. So proceeding in federal court is
25 not --

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1 THE COURT: Not --

2 MR. LEVY: -- not impossible. It just has to be done
3 a certain way. And the way you do it is not by bringing a
4 breach of contract action. The way you do it is file a motion
5 to have the Court enforce the confession of judgment.

6 THE COURT: And in that -- now that we agree that
7 SKAT can be in federal court, what is the barrier to if they
8 proceeded that way to have a part of the proceeding in federal
9 court be a determination of the true-up amount?

10 MR. LEVY: That's -- we accept that that may happen.

11 THE COURT: Okay.

12 MR. LEVY: We fully accept that that may happen
13 because we recognize there is a dispute about the true-up
14 amount. You just don't get to bring a breach of contract
15 action under this agreement because it says the sole remedy is
16 the filing of the confession of judgment.

17 And so this is what SKAT should have done in the
18 first place is file a declaratory judgment action seeking to
19 have the Court make a determination about what the true-up
20 amount is. They just don't get breach of contract, a breach of
21 contract action. Their right to recover stands and falls with
22 the affidavit of confession of judgment.

23 And the cases we cite, that are mostly on page 8 of
24 our reply brief, about why this safety valve about what
25 happens if your remedy fails, you don't get a legal remedy if

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1 your equitable remedy fails, you get an equitable remedy. And
2 here they don't want an equitable remedy. They want a breach
3 of contract action. That's money damages. That's a legal
4 remedy. So we cite it on pages -- mostly on page 8, right,
5 their action for money damages via the affidavit of confession
6 of judgment seeks a legal remedy—money.

7 And in the instances where an equitable remedy is
8 impossible, courts have granted something in lieu of that.
9 But here they just want money for money. It's just the path
10 they want to take that's different. And the fact of the
11 matter is there is no case suggesting that if the affidavit of
12 confession of judgment is unenforceable, they get something
13 else in a case where it's their sole remedy. Their right to
14 recover stands and falls with the affidavit of confession of
15 judgment.

16 And, as I said, if you want to deny the motion as to
17 the -- as to the enforcement of the affidavit of confession of
18 judgment, because the validity of the confession of judgment
19 is really not before the Court on this motion, and grant the
20 motion as to the alternative remedy of breach of contract, we
21 are fine with that because they bargained away the right to
22 bring a breach of contract action, and I'm not going to let
23 them do it in two -- within the six-year statute of
24 limitations. Now is their time. And if the affidavit of
25 confession of judgment is determined to be invalid, so be it.

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1 These are the risks that they undertook.

2 And if they are going to say they didn't know of the
3 change in law in 2021 when the new affidavit of confession of
4 judgment was provided, that is a mistake of law, and they are
5 not entitled to a remedy—it's extra-contractual—for having
6 made a mistake of law.

7 And if they did know -- and I submit that they may
8 have known, and here is why. In April of 2021, Mr. Stein and
9 Mr. Lhote and Mr. McGee were charged by the Danish
10 authorities. This is mostly set out in paragraph 77, 78, 79
11 of our complaint. They were indicted.

12 Immediately thereafter, their counsel began pressing
13 SKAT for evidence that SKAT had complied with section 8(f).
14 That's the provision that our Count One is based on, right?
15 Did they write this, for lack of a better term, good-guy
16 letter, saying these people settled, they are cooperating,
17 they paid back some money, they are going to help get some
18 more money?

19 They immediately began pressing and they got—I will
20 be slightly glib here—some mealy-mouthed responses from SKAT.
21 And then eventually in June of 2021, so this is around the
22 same time that the second affidavit of confession of judgment
23 needs to be provided, around the same time, SKAT -- you could
24 see might not want to answer the question about whether they
25 have provided the writing to the Danish prosecutors that they

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1 were required to provide. And you could imagine that SKAT may
2 have said to itself, you know what, we are not going to answer
3 this question and we will take the affidavit of confession of
4 judgment that we can get because we don't want these people to
5 know that we have breached section 8(f).

6 So I understand the Court has questions about the
7 good faith of the covered parties' designees, and that could
8 be resolved through discovery. They have questions about the
9 good faith of SKAT, and those are just as legitimate and just
10 as much need to be resolved by means of discovery as the
11 questions of good faith of the plaintiffs and Mr. McGee.

12 So --

13 THE COURT: If I disagree with you and find that
14 Mr. Lhote and Mr. McGee waived their arguments under the
15 revised statute, we don't have to get into that.

16 MR. LEVY: I don't -- first of all, that question is
17 not before the Court on this motion about whether there has
18 been a waiver.

19 THE COURT: I think each time I've been a little
20 ahead of maybe where we were.

21 MR. LEVY: But we didn't brief that question, SKAT
22 didn't brief that question, and I submit it shouldn't --

23 THE COURT: It may be something that we should be
24 briefing.

25 MR. LEVY: If you think that we should provide some

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1 more briefing now because you are contemplating -- I don't
2 know what relief you would -- that would require a finding
3 that the -- there has been a waiver of 3218 that's relevant to
4 our Count Two, our declaratory judgment action, and that's not
5 before the Court. SKAT hasn't moved to dismiss it. And so if
6 the Court is contemplating taking action with respect to it, I
7 submit that it's not properly before the Court at this time.
8 So if you want there to be briefing about whether there has
9 been a waiver or not, I submit that it would also require some
10 factual development about what the individuals knew and,
11 frankly, what SKAT knew because you may think the individuals
12 knew. What if the individuals knew and SKAT also knew? Well,
13 then everyone is undertaking the risk going forward, and I
14 submit that that's not necessarily an appropriate instance in
15 which to find waiver. What if the individual defendants
16 didn't know and SKAT did know? So imputing knowledge on a
17 motion to dismiss that -- on a claim that's not before the
18 Court, I submit, would be really beyond what the Court should
19 be doing at this stage of the proceeding.

20 THE COURT: I'm not going to argue with you about
21 that. There is no -- I recognize that there are things that
22 we have given a lot of thought to that are not necessarily
23 front and center before us, but at the same time I don't think
24 it is -- I think it may be helpful for the parties to have
25 some sense of the Court's thinking.

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1 MR. LEVY: Fair enough. And I think it would be
2 important to have there be some factual development about what
3 was in the heads of the parties. Like I said, if the
4 individuals did not know that this piece of paper that they
5 were providing was questionable, let's call it that, in its
6 full enforceability and SKAT did know, you could see a Court
7 being pushed one direction or another on -- in deciding Count
8 Two. If no one knew, you could see it going a different way.
9 If the defendant did know and SKAT didn't know, I don't know,
10 we are going to have to find out in discovery.

11 THE COURT: There is also kind of a broader question
12 about whether the whole residency issue applies when there is
13 an action brought to enforce a confession of judgment, and
14 that's another sort of subject.

15 MR. LEVY: Correct, I think that's --

16 THE COURT: And makes, frankly -- there is a lot of
17 logic to saying there is one set of rules for *ex parte* filing
18 of a confession of judgment versus another set of rules that
19 apply when it's part of an action and which the action itself
20 takes care of notice that doesn't otherwise exist necessarily
21 when it's an *ex parte* filing.

22 MR. LEVY: That may be, and there may come a time
23 where we need to brief the applicability of that *Express Trade*
24 case that I know the Court has read. It's just not --

25 THE COURT: Beyond that, it makes a lot of sense.

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1 MR. LEVY: I submit it doesn't, and it's not
2 consistent with the language of 3218 and that the work around
3 that's allowed under New York State law which is -- which
4 allows for filing of a summary judgment in lieu of complaint
5 might work for state court, but it sure doesn't work in
6 federal court where there is no such thing. So --

7 THE COURT: And no one is proposing that. Okay.
8 Look. I think I probably said enough. Maybe counsel for SKAT
9 should chime in.

10 MR. WEINSTEIN: Thank you, your Honor.

11 I don't think we need to chime in much. I think your
12 Honor has hit almost every issue right on the head.

13 It's ironic because in their papers they continue to
14 say that the parties bargained for a very simple procedure
15 here if they breached, which they did, yet at every possible
16 opportunity Mr. Levy wants to make this as complicated as he
17 can, to have additional briefing, to have discovery on
18 people's mindsets, on every possible provision in the
19 agreement, which will just lengthen the time in which they
20 refuse to pay. That is their obligation.

21 Let's go back to the beginning. The fundamental
22 principle of this settlement agreement was that these parties
23 pay back the money they took. It's not my position. It's in
24 the whereas clause right on page 1 of the settlement
25 agreement.

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1 Their obligation to pay is absolute and
2 unconditional. That's in Mr. Levy's favorite section, 2(c).
3 So with respect -- I know we are not here on this, but with
4 respect to their argument that we breached and therefore they
5 don't have to pay, that couldn't be more clear in the
6 agreement that that's not the case. Their obligation to pay
7 is unconditional, and any breach that they think they can come
8 up with on SKAT's part is not an event of default in the
9 contract. There are only two, one of which happened. They
10 refused to pay. It's time for them to pay, and it's time for
11 us to get the judgment.

12 For our counterclaims we only seek two things—a
13 determination of the true-up amount they refuse to deal with
14 and the entry of the judgment. It is, frankly, hard to
15 understand why we are even here for so long on this motion.
16 Your Honor said it, I think, twice exactly right: this is
17 entirely form over substance. We are seeking exactly what
18 they agree we can seek in this court. The dispute on the
19 true-up, they contracted to us being able to bring that issue
20 in this Court if the controversy was over 20 million krone,
21 which it is, and that with respect to the entry of a judgment,
22 we could do so in this Court. We are here doing those two
23 things. We are not seeking anything more than that. Not a
24 penny more or less, frankly, but certainly not a penny more
25 than exactly what they contracted to having to pay us if and

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1 when they breached, which they did. Everything else is
2 entirely form over substance.

3 The format of the claim, I mean, the argument is, with
4 respect to the true-up, we should have titled it a declaratory
5 judgment. If we went to Court before they ever decided they
6 weren't going to pay, it might have been that form because
7 there would not yet have been an issue with respect to them
8 clearly saying they are not going to pay. But now they have.
9 They brought the action, not us. They brought it before the
10 date by which they were supposed to pay us. So at the time we
11 didn't have the right to go into Court to say they breached
12 for lack of payment because that date hadn't come yet. They
13 filed suit saying we are not paying. The time came.

14 The reason and only reason -- in our contract claims,
15 we styled them breach of contract, but we say very clearly up
16 front our claim is for the entry of the confession of judgment
17 they signed and only in the alternative did we say it's breach
18 of contract, and it's exactly for the reason your Honor
19 pointed to at the beginning. They are trying to set this up
20 to say SKAT has no remedy to get paid by saying you can only
21 do it if you put the name on the top of the piece of paper as
22 a filing of the entry of confession of judgment and then,
23 second, you argue well that confession of judgment is not
24 enforceable. So the only reason we are even saying in the
25 alternative it's -- you can call it breach of contract claims

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1 is because of how they styled this action.

2 With respect to the confessions of judgment
3 themselves, just to be clear, their argument is those
4 confessions were invalid from the outset, so they, according
5 to them, they entered into this settlement agreement with a
6 confession of judgment that they say was unenforceable at the
7 time they entered into it because it somehow -- it didn't
8 specifically say the sum certain. I think your Honor's
9 indicated—and it's certainly our position—that argument has
10 no merit. Almost every case cited on a confession of judgment
11 leaves open the actual number because there are things that
12 will have to be calculated and they are calculated in an
13 attorney affidavit at the time you are going to file in court
14 for whenever you are going to seek the entry of judgment. We
15 cited a few extra cases on that, but virtually every case,
16 whether it's you have to deduct amounts already paid since the
17 confession of judgment was signed or interest or attorney's
18 fees or costs, whatever it is it might be, there are things
19 you cannot know the number at the time the confession of
20 judgment or the affidavit is executed. It's only going to be
21 filled in later. So that argument has no merit.

22 And then their second argument is this resident
23 argument. As your Honor has indicated, Mr. Stein does not
24 have that argument, so it doesn't apply to him at all.
25 Mr. McGee did not bring claims in this court saying that it

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1 was invalid as to him. Only Mr. Stein and Mr. Lhote brought
2 those claims.

3 First of all, as your Honor indicated, there is no
4 reason that they could not have waived any requirement as they
5 did in the confession of judgment itself; but, secondly, the
6 law is, from the First Department in *Express Trade*, very clear
7 that that does not apply in this circumstance where you have
8 brought an action.

9 So unless the Court has any questions, I don't think
10 we need to belabor the points that have been made. We are
11 seeking exactly what the parties bargained for, which is to
12 get paid the specific amount that the parties put in the
13 calculations in the settlement agreement.

14 THE COURT: Mr. Levy, did you want to say anything?

15 MR. LEVY: Sure, just very, very briefly.

16 I did want to address this point that Mr. Weinstein's
17 made a number of times about sort of absolute and
18 unconditional. That language appears in section 2(c) of the
19 settlement agreement. It's the same paragraph that actually
20 says that SKAT's remedies are limited to the sole remedy of
21 the filing of the affidavit of confession of judgment.

22 But let me just back up for one second. The language
23 that says absolutely unconditional says that the cover parties
24 have the absolute and unconditional obligation to pay the
25 final settlement amount. I'm just going to get the settlement

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1 agreement in front of me so I can use the exact language.

2 THE COURT: Are you talking about --

3 MR. LEVY: 2(c).

4 THE COURT: It's also the whereas clause, right?

5 MR. LEVY: Well, the whereas clause is not
6 informative in the same way that the rest of it is.

7 It is 2(c). "The covered parties' obligation to pay
8 the final settlement amount is absolute and unconditional."
9 There are -- and the covered parties is a very large group of
10 people who signed the settlement agreement.

11 And then if you skip down to the last sentence which
12 contains the sole remedy it says, "In the event that the
13 covered parties timely complete the initial cash payment"—and
14 that's undisputed, that's the first 950 million krone—"then
15 SKAT's sole remedy for the covered parties' failure"—the
16 covered parties', the large group's failure—"is to proceed
17 only against the covered parties' designees."

18 So 150 people and entities have an obligation to pay,
19 and if they don't, they don't make that absolute -- fulfill
20 that absolute and unconditional obligation, SKAT's remedy is
21 limited as against to only three people. I can't understand
22 why -- how that could mean that the large group's obligation
23 to pay is absolute and unconditional. If I say, Judge, you
24 must pay me this money, but I have no remedy against you, then
25 it can't be absolute and unconditional. It's preposterous.

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1 But at the very least it's ambiguous.

2 And then the supposed absolute and unconditional
3 obligation is further limited because there is only one remedy
4 that SKAT has provided for, which is the filing of the
5 affidavit of confession of judgment as against the covered
6 parties' designees. So the notion that this absolute and
7 unconditional obligation is truly absolute and unconditional,
8 it can't be because it is not. Because if there are no
9 consequences to not paying, then I submit it is not absolute
10 and unconditional. And if there are consequences to the
11 covered parties' designees but the remedy is limited, it is
12 still not absolute and unconditional. It is quite unclear.

13 THE COURT: What is this getting to? This is another
14 part of the agreement that you think isn't worth it's paper
15 it's written on.

16 MR. LEVY: No, it's not a question of it's not worth
17 the paper its written on, the question is Mr. Weinstein
18 suggests that that means that SKAT cannot breach this
19 agreement, and there is no provision of the law of contracts
20 that gives one party no obligation to perform and the other
21 party has the entire -- the absolute and unconditional
22 obligation to perform.

23 So I just wanted to address that at the outset. The
24 notion that this language and a recital sweeps away the rest
25 of the provisions that limit SKAT's remedy to the filing of

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1 the affidavit of confession of judgment, which is in 2(c),
2 it's in section 5, and it's elsewhere, that that just can't
3 be. The notion that SKAT can't breach this agreement, it
4 simply can't be, and that they have the ability to do whatever
5 they want, including not perform, but the covered parties'
6 designees do have to perform, that can't be. There are no
7 cases -- again, this was not raised. SKAT didn't brief the
8 issue of how far this absolute and unconditional language
9 goes. But this will surely come up when we have to resolve
10 the issue of whether they breached the obligation under 8(f).

11 So you have been ahead of where we are and we are,
12 too.

13 MR. WEINSTEIN: Just to be clear -- I'm sorry. Are
14 you still going?

15 MR. LEVY: Yes.

16 MR. WEINSTEIN: Okay.

17 MR. LEVY: We seek to enforce this contract and, in
18 particular, in this instance, the obligation that SKAT
19 undertook to limit itself to the sole remedy of filing the
20 affidavit of confession of judgment. We are not trying to do
21 anything other than read the words on the page and hold SKAT
22 to its bargain. I didn't write the contract. Sophisticated
23 parties with lots of lawyers did, and they used these words
24 "sole remedy." And the question is are they to be given some
25 effect or are they to be given no effect? And we submit that

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1 the Court should give some effect to them and simply dismiss
2 that portion of SKAT's counterclaims that seeks the
3 alternative remedy of contractual damages.

4 We will have some litigation over what the true-up
5 amount is. We will litigate our Count One, whether they
6 breached the obligation under section 8(f). We will have some
7 litigation over the true-up amount. Hopefully we can
8 stipulate to some of the factual issues and narrow them
9 substantially. But they are not entitled to, because they
10 bargained away the right to, bring a breach of contract
11 action. It's a simple matter of section 2(c). It's not some
12 scheme. It's not some sham. It's not some effort to get
13 around the language of the contract. It's an effort to hold
14 everyone to the language of the contract. And if that's the
15 Court's ruling, to deny the motion to dismiss as to the amount
16 sought by way of affidavit of confession of judgment and grant
17 the motion as to the alternative remedy of a breach of
18 contract, the alternative procedure that SKAT has availed
19 itself of, we are fine with that.

20 MR. WEINSTEIN: Two things, your Honor.

21 One is, with respect to the language I pointed to in
22 2(c) the absolute and unconditional, I didn't say SKAT couldn't
23 breach the agreement, but that is clear that a breach by SKAT
24 cannot undo their absolute and unconditional requirement to
25 pay. That is not a remedy they have, that if there is some

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1 breach they come up with that they don't have to pay. Because
2 that payment obligation is absolute and unconditional. The
3 fact that the -- it starts with the covered parties broadly,
4 but most of the covered parties are then absolved of that if
5 they make an initial payment. It only gets to the fact that
6 it's that absolute and unconditional once that first payment
7 is made, then lies with the three gentlemen who are here
8 today. It's their obligation, which is absolute and
9 unconditional, to pay. Zero condition on that.

10 One other thing I just wanted to point out—I forgot
11 to before, your Honor—with respect to -- again, Mr. Levy does
12 not dispute that in order to get an entry of judgment on this
13 confession of judgment in federal court, we would either have
14 to bring an action, we have to sue them. He says he didn't
15 like the fact that we sued them. He agrees we have to sue
16 them to do that. We have to bring an action against them. Or
17 if there is a pending case, as there was, we bring the
18 action -- we bring the claim in that case.

19 He has determined that there is a single way to do
20 that. That's him saying that there is only one way in the
21 world to do that, to get an entry of judgment on a confession
22 of judgment in federal court. He is simply wrong. It's
23 not -- he doesn't get to make the rules or tell us how the
24 format has to be.

25 We cited to, among others, the *Varbero* case in

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1 federal court, and then they attached it, where we said, look,
2 that's a case where it was a confession of judgment. They
3 filed in federal court to enforce it, and they did it by
4 bringing a breach of contract claim on the underlying contract
5 that was breached, and the damages they wanted were the
6 damages that were allowed in the confession of judgment.

7 But that case and others, they simply in the reply
8 brief said no, no that's nothing like what SKAT is saying they
9 want to do, and then they actually attach the complaint to his
10 declaration. It's Exhibit F -- no, sorry, it's Exhibit E to
11 Mr. Levy's declaration in his reply brief. That is the -- I'm
12 sorry. That was the *Darwiche* case. No, it is Exhibit F. My
13 apologies, your Honor.

14 The *Varbero* case, this is the complaint, in Count One,
15 which is the one where they seek the amount that's in the
16 confession of judgment that had been signed, is a breach of
17 contract claim on the promissory note that underlaid the
18 confession of judgment. That was the mechanism they used in
19 that case. It's the same exact one we have here.

20 So his saying in his reply brief that it's nothing
21 like it and just citing the case, maybe he didn't look at it,
22 but it is right there. And the other ones he attaches also
23 talk about a breach of the underlying contract. I actually
24 don't think they put a name on the count, but there is no
25 difference. It's, again, we are talking about completely form

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1 over substance, but at least in this case the form is exactly
2 the same.

3 MR. LEVY: May I just address that very, very briefly,
4 your Honor? Those three cases we put them in an Exhibits F,
5 G, and H to my supplemental declaration, they are entirely
6 unlike what SKAT wants to do here because none of those cases
7 was a sole remedy case. In none of those cases had the
8 nonbreaching party limited itself to filing -- to one remedy
9 and one remedy alone, and there is absolutely no case, there is
10 zero case, no case can be found. SKAT has cited no case where
11 a party seeking to enforce an affidavit of confession of
12 judgment brought a contract action to determine the amount,
13 obtained a judgment on the amount, filled the judgment amount
14 into the affidavit of confession of judgment, and then filed
15 or moved to file the affidavit of confession of judgment.
16 There is zero case, none, none. None of those cases, F, G, H,
17 D, all of those exhibits, none of them involved a sole remedy.

18 So if SKAT had not limited itself to the sole remedy
19 of filing the affidavit of confession of judgment, we would not
20 have had any grounds to move to dismiss. We moved to dismiss
21 and the part of their contract action that seeks -- excuse me,
22 the part of their Count One and Two that seeks contractual
23 damages that they have bargained away is completely
24 unprecedented. There is zero case like this, none, zero. No
25 precedent whatsoever. And we scoured to the ends of the earth

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1 to find them.

2 Thank you.

3 THE COURT: All right. There are a couple of other
4 parties in the room. This is your moment to shine.

5 MR. NEWMAN: Your Honor, Dan Newman on behalf of
6 counterclaim defendant.

7 I believe that Mr. Levy has hit the issue. The
8 issues are the same for both of them.

9 I would say in response to what Mr. Weinstein said at
10 this point in time, a motion to dismiss, which Mr. McGee
11 joined in, has not been decided, so as it pertains to any
12 response to the counterclaim in which he was brought into
13 this, it's not the point in time for him to respond and assert
14 any claims as to that.

15 But as to the other issues, I think Mr. Levy has
16 outlined the issues. They equally apply to Mr. McGee as much
17 as they apply to Mr. Lhote and Mr. Stein. I don't think there
18 is anything that -- individually that changes that.

19 THE COURT: Okay. Do you want to address at all the
20 first paragraph of the affidavit of confession of judgment?

21 MR. NEWMAN: I'm going to have Mr. Pees address that.
22 He was involved in the process.

23 MR. PEES: Your Honor, I think I could shed some
24 light on the big picture here with respect to affidavits of
25 confession of judgment and this particular new requirement

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1 that they can only be entered in the county where a party
2 resides at the time of execution or where they reside at the
3 time of enforcement. As I understand the amendments, they
4 were designed to prevent -- to prevent abuses against
5 out-of-state debtors, if you will.

6 THE COURT: Absolutely.

7 MR. PEES: And to the extent your Honor is
8 contemplating a ruling suggesting that a party can knowingly
9 waive the requirement that the clerk in a New York Court can
10 only enter an affidavit of a confession of judgment in the
11 county where the signer of the affidavit resided at the time
12 of execution or at the time later of enforcement, I fear that
13 that may create a rule of law that will be exploited
14 mercilessly by lenders. Because the one missing ingredient in
15 the *Express Trade* case that your Honor referred to is a
16 reference to that requirement in the newly amended statute
17 that says the clerk may only enter in the county where the
18 signer resided at the time of execution or resides at the time
19 of enforcement.

20 And I think that the reason that the *Express Trade*
21 court didn't address that language is because it was
22 essentially irrelevant, because in that particular case, what
23 was really happening was that, in lieu of using the expedited
24 let's just file the affidavit of confession of judgment, they
25 were using another expedited procedure, 3213, summary judgment

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1 in lieu of complaint, and that's what Mr. Levy was referring
2 to.

3 And so I'm raising this really to avoid a scenario
4 where, perhaps as *dicta* in an opinion or a ruling, there is
5 inadvertently, if you will, a defect in the reasoning that
6 will be exploited mercilessly by lenders. Because otherwise,
7 your Honor, you could have -- it will be a new form affidavit
8 of confession of judgment in the State of New York. There
9 will be lenders writing in "I knowingly acknowledge and waive
10 the requirement that the clerk can only enter judgment in this
11 particular county," and it's going to, in effect, gut the
12 legislative purpose of the statute if one were to argue that a
13 party can knowingly waive that requirement, assume just for the
14 sake of argument.

15 THE COURT: Well --

16 MR. PEES: I think you get my point.

17 THE COURT: I get your point.

18 MR. PEES: Thank you.

19 MR. NEWMAN: Your Honor, there is one other point
20 that I did want to raise as it pertains to the arguments
21 Mr. Levy made as to the sole remedy.

22 I think what is important also, the parties sliced
23 this up. Now, they brought a breach of contract claim, and
24 Mr. Levy has argued that they cannot bring that -- their sole
25 remedy is the entry of the confession of judgment. If you

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1 look at that same paragraph, in paragraph -- if you look at
2 section 2, the parties understood there could have been
3 potentially a breach of contract action here if the initial
4 payment wasn't made. Right? If the initial payment wasn't
5 made, there could have been a breach of contract action. But
6 what the parties specifically said in paragraph (c), to put a
7 finer point on it, "In the event that the covered parties'
8 time is complete, the initial cash payment"—that's the one
9 that was completed—"then the sole remedy for the covered
10 parties' failure to pay the remainder of the final settlement
11 amount shall be the filing of the affidavit of confessions of
12 judgment against the covered parties designees as set forth in
13 section 5(c)."

14 That language further underscores the argument that
15 Mr. Levy made that the parties contemplated that and that they
16 waived the right to bring the breach of contract action once
17 that initial payment was made. They contracted for that, the
18 parties considered that, the language is specifically set
19 forth in the agreement, respectfully.

20 THE COURT: I think that, just to respond, that what
21 you are both leaving out is that there are many other
22 provisions, at least several other agreements in the
23 settlement agreement that contemplate other types of lawsuits
24 and remedies and that may indicate that there is an argument
25 that the sole remedy language doesn't quite mean what it says

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1 and that the sole remedy refers more to whom the confession of
2 judgment is applicable and that all these other hundred or
3 hundred and fifty folks who benefited from this scheme are no
4 longer on the hook and only three people remain on the hook.

5 So I just think there is a lot of language in the
6 agreement which indicates that there are other remedies and
7 clearly other courts. You know, this is a pretty -- there are
8 a number of options.

9 MR. NEWMAN: Respectfully, what I would just say to
10 that is, with regard to the other remedies and it being
11 broadly as to who you can bring it against, I don't believe
12 that the language that I just talked about would be consistent
13 with that. The parties sliced up this payment obligation to
14 say if there is no payment, you get to bring a breach of
15 contract. If not, your remedy is limited. And the other
16 provisions I believe is what your Honor may be referring to
17 are with regard to the true-up process, but that doesn't
18 contemplate necessarily a breach of contract action. That's
19 an expedited procedure to decide whether that true-up has been
20 met or not.

21 THE COURT: Not quite true. If the parties can't
22 agree, it's open season for remedies for either side.

23 MR. NEWMAN: That was the only point I wanted to make
24 to your Honor.

25 MR. LEVY: I just want to raise -- respond just very

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1 briefly to what your Honor just said, which is that it is open
2 season as to other remedies. I submit that that's an
3 erroneous interpretation of that provision of section 10. It
4 doesn't, because it refers back to other remedies under
5 section 5, and the section 5 remedies are limited to -- in two
6 ways: against whom and what means.

7 THE COURT: "Any party may resort to any other
8 available remedies, including through other available remedies
9 in a selected court" is one part of the language that I have
10 referred to. Similarly, that's --

11 MR. LEVY: But your Honor has to look at the initial
12 part of that sentence which is "if the matter remains
13 unresolved."

14 THE COURT: Right, and it is.

15 MR. LEVY: We are looking at the end of paragraph
16 10(c), correct?

17 THE COURT: Right.

18 MR. LEVY: Yeah. If the matter remains unresolved,
19 and the matter is what is the amount of the true-up.

20 THE COURT: I totally understand that.

21 MR. LEVY: Yeah.

22 THE COURT: I appreciate that.

23 MR. LEVY: But it -- it's -- go ahead. I'm sorry.

24 THE COURT: Except that the resolution of the true-up
25 amount is integral to the confession of judgment, and it is --

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1 I don't think there really is a dispute that there are other
2 proceedings or procedures that have to be undertaken to figure
3 out what the true-up amount is before the confession of
4 judgment can be filed.

5 MR. LEVY: That may be, but it's not the bringing of
6 a breach of contract action. And if your Honor looks at
7 the --

8 THE COURT: It doesn't say "except for."

9 MR. LEVY: It certainly suggests that. And if your
10 Honor looks at paragraph 10(e), "The parties acknowledge that
11 the means of dispute resolution set forth in this section 10,"
12 which includes the paragraph that your Honor just read, "shall
13 not limit the remedies available to SKAT upon the occurrence
14 of an event of default pursuant to section 5 of this
15 agreement." And section 5 refers back to the filing of the
16 confession of judgment. It's all of a piece. And the notion
17 that this language that bears on one part of SKAT's claim
18 permits them to bring a breach of contract action for
19 everything, that I submit is doing violence to the language of
20 the agreement.

21 THE COURT: It is actually the only thing that, apart
22 from the merits, is still meaningfully in dispute because the
23 600 million krone is set and the two interest payments are
24 mathematical. This is the sole substantive dispute that needs
25 to be resolved before you can know the actual amount of the

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1 confession of judgment.

2 MR. LEVY: That may be, and it then refers back to
3 section 5 and section 2, which gives SKAT one remedy to force
4 the payment of it.

5 Thank you, your Honor.

6 THE COURT: Okay. Very good. Thanks. Everybody
7 goes in peace? Goes in peace.

8 MR. LEVY: Thank you, your Honor.

9 MR. WEINSTEIN: Thank you, your Honor.

10 MR. NEWMAN: Thank you, your Honor.

11 oOo